

STATE OF MICHIGAN
COURT OF APPEALS

NORTHVILLE PUBLIC SCHOOLS,

Plaintiff-Appellee/Cross-Appellant,

v

COUNTY OF WAYNE, DEPARTMENT OF
PUBLIC SERVICES,

Defendant-Appellant/Cross-
Appellee.

UNPUBLISHED

June 16, 2005

No. 253893

Wayne Circuit Court

LC No. 03-331929-AW

Before: Gage, P.J., and Whitbeck, C.J., and Saad, J.

PER CURIAM.

Defendant County of Wayne, Department of Public Services (Wayne County) appeals as of right from the second writ of mandamus compelling it to issue the remaining permits necessary for plaintiff Northville Public Schools (Northville Schools) to complete the underground installation of a fiber optic cable within Wayne County's road right of way. We affirm.

I. Basic Facts And Procedural History

Pursuant to a resolution that the Northville Public Schools Board of Education adopted, Northville Schools submitted an application for a permit from Wayne County for the underground installation of a fiber optic cable network in Wayne County's road right of way. The cable network was part of the effort by Northville Schools to upgrade its technology. Wayne County denied the application as originally proposed but granted a revised version of the application requiring a \$100,000 bond and prohibiting construction in certain areas until proof of an easement from a third-party property holder was presented.

On September 24, 2003, Northville Schools filed a complaint for mandamus or declaratory relief, and the trial court entered an order for defendant to show cause why the writ of mandamus or declaratory judgment should not be issued. Following a show cause hearing, the trial court allowed installation of the cable pursuant to the permit Wayne County had issued, but reserved judgment regarding the validity of the restriction on distance for further argument. The parties agreed to reduce the security amount for the permit from \$100,000 to only \$4,000. The revised permit restricted installation of the cable to areas where Wayne County's right of way was at least fifty-seven feet from the centerline of the roadway.

In October of 2003, the trial court heard further argument regarding the restriction on distance in the Wayne County's revised permit. The trial court concluded, "I find that the 57-foot restriction, it is arbitrary and unreasonable, and that to maintain that condition is to effectively deny a permit." The trial court granted the request of Northville Schools for a permit allowing access to install the cable within thirty-three feet from the centerline of the roadway when necessary and at fifty-seven feet from the centerline otherwise. The parties submitted differing proposed orders, and the trial court ruled that Wayne County's proposed order complied with its prior ruling. The trial court issued a writ of mandamus, stating:

Defendant, County of Wayne, shall forthwith amend the permit agreement previously entered into for installation of fiber optic cable within the road right of way south of the centerline of Six Mile Road permitting the Plaintiff access within the 33 feet of centerline where nothing more is available; where available the cable shall be 57 feet from centerline subject to variations necessitated by field conditions such as pre-existing utilities or other impediments in the ground.

The trial court further ordered that "this Order is applicable to Six Mile Road, only" and that "all other conditions of the permit agreement remain in full force and effect."

In November of 2003, Northville Schools filed a second motion for a writ of mandamus and attorney fees. Northville Schools alleged that it completed the initial phase of its three-phase project to install fiber optic cable through Wayne County south of Eight Mile Road. Northville Schools asserted that the initial phase was completed because of the trial court's writ compelling Wayne County to issue it a permit to install the cable along the south portion of Six Mile Road. Northville Schools also asserted that Wayne County continued to deny it access to the remaining portions of the right of way necessary to complete the final two phases of the project. Northville Schools argued that it was entitled to access through the county road right of way without a restriction on the distance and without having to obtain easements from third parties. Northville Schools contended that the Wayne County's defenses were frivolous and that its position lacked legal merit, and therefore, Northville Schools was entitled to attorney fees and costs for the delay of the project and for having to file a second motion to compel Wayne County to issue permits allowing it to complete the project.

In December of 2003, the trial court heard oral arguments on the motion for a second writ of mandamus and attorney fees and costs. The trial court expressed its confusion over why this matter was again before it and ruled in favor of Northville Schools. The trial court stated:

Maybe part of this is my fault. When we were last here I thought that what was sought was a permit for the entire project. That's what I thought we were all talking about.

And I went on that basis, and I find out when you were all last here with me a couple of days ago in chambers, in what was an unnecessary hearing or appearance, that this project is in three phases, and, apparently, requiring three different permits, and that's where my confusion is because I thought when we were here, we were done with this case.

It's going to be the same order that we ordered to be issued. I mean, I keep going back to perhaps my misunderstanding about what we were about when we were last here.

Whether it's one permit or three permits, they're to be issued so that this project can be completed.

So I'm granting the relief requested.

However, the trial court ruled that Northville was not entitled to receive attorney fees and costs because Wayne County "had a position which [was] not untenable, it just didn't prevail."

In January of 2004, the trial court heard additional arguments regarding issuance of the second writ of mandamus. Wayne County argued that the proposed order should permit defendant a fixed time period in which to exercise its discretion to review the permit, apparently for potential engineering problems. The trial court accommodated Wayne County's concern by ruling that it would not be held in contempt if a problem manifested that would require changes to the installation or further resolution of the matter. However, the trial court explained that "for the sake of being able to go forward efficiently, we need this order to be signed." Accordingly, the trial court entered an order granting the motion for a second writ of mandamus, stating:

ITS IS HEREBY ORDERED that Defendant, COUNTY OF WAYNE, shall forthwith issue its second permit for installation of fiber optic cable for the balance of Plaintiff's telecommunications project as described in Defendant's letter dated July 28, 2003, within the County road right of way situated in Northville Township, Wayne County, Michigan . . . which will thereby permit the Plaintiff access within 33 feet of centerline of the County road right of way where no wider road right of way is available and, where wider road right of way is available, at 57 feet from centerline, subject to variations necessitated by field conditions such as pre-existing utilities or other underground impediments.

IT IS FURTHER ORDERED that all other terms and conditions of the first permit, dated September 26, 2003, not inconsistent with the specifics [sic] terms and conditions set for[the] above, shall be incorporated therein.

The trial court's order also denied the request of Northville Schools for costs and attorney fees relating to this action. The trial court stated that this order resolved the last pending claim and closed this case. Wayne County appealed the trial court's order granting the motion for a second writ of mandamus and Northville Schools filed a cross-appeal from the trial court's denial of its request for attorney fees and costs.

II. The Second Writ Of Mandamus

A. Standard Of Review

Wayne County argues that the trial court erred in issuing the writ of mandamus because it usurped its constitutional right to issue and restrict construction permits for the use of the public right of way along a county roadway. We review a trial court's decision concerning an order of

mandamus for an abuse of discretion.¹ A trial court's decision constitutes an abuse of discretion when the result is "so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion."² We also review a trial court's factual determinations for clear error.³ Factual findings are clearly erroneous "if there is no evidence to support them or there is evidence to support them but this Court is left with a definite and firm conviction that a mistake has been made."⁴ Statutory construction is a matter of law that we review de novo.⁵

B. Understanding A Writ Of Mandamus

A court issues an order of mandamus to compel a public body or official to perform a clear legal duty.⁶ However, mandamus is an extraordinary remedy and must not be used as an instrument to review or control the discretionary functions vested in a public officer or administrative body.⁷ As an extraordinary remedy, "[t]he issuance of a writ of mandamus is proper where (1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial and involves no exercise of discretion or judgment, and (4) no other remedy exists, legal or equitable, that might achieve the same result."⁸ Mandamus "may lie to compel the exercise of discretion, but not to compel its exercise in a particular manner."⁹

C. The Authority Of A County

"[A] county's authority is derived from and limited by the constitution and valid state statutes."¹⁰ The Michigan Constitution provides, in relevant part:

No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets,

¹ *Baraga Co v State Tax Comm'n*, 466 Mich 264, 268-269; 645 NW2d 13 (2002); *In re MCI Telecom Complaint*, 460 Mich 396, 443; 596 NW2d 164 (1999).

² *Schoensee v Bennett*, 228 Mich App 305, 314-315; 577 NW2d 915 (1998).

³ MCR 2.613(C).

⁴ *Zine v Chrysler Corp*, 236 Mich App 261, 270; 600 NW2d 384 (1999).

⁵ *Weakland v Toledo Engineering Co*, 467 Mich 344, 347; 656 NW2d 175 (2003).

⁶ *Lee v Macomb Co Bd of Comm'rs*, 235 Mich App 323, 331; 597 NW2d 545 (1999), rev'd on other grounds 464 Mich 726 (2001).

⁷ *Tuscola Co Abstract Co, Inc v Tuscola Co Register of Deeds*, 206 Mich App 508, 510-511; 522 NW2d 686 (1994).

⁸ *Lickfeldt v Dep't of Corrections*, 247 Mich App 299, 302; 636 NW2d 272 (2001).

⁹ *Musselman v Governor of Michigan*, 448 Mich 503, 521; 533 NW2d 237 (1995).

¹⁰ *Engineered Housing Concepts, Inc v County of Wayne*, 180 Mich App 465, 469; 447 NW2d 777 (1989).

alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; . . . Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.¹¹

MCL 224.19b applies directly to a county's issuance of utility permits to a government entity and provides, in relevant part:

(1) A person, partnership, association, corporation or governmental entity shall not construct, operate, maintain or remove a facility or perform any other work within the right of way of a county road except sidewalk installation and repair without first obtaining a permit from the county road commission having jurisdiction over the road and from the township, city or village in which the county road is located when a permit is required by ordinance of the township, city or village, pursuant to authority conferred by article VII, section 29 of the Michigan constitution of 1963.

(4) A county road commission *may not refuse* a permit requested by a government entity for the installation of a facility or utility owned by that entity if security is given by the permittee or its contractor to the county road commission sufficient to insure restoration of the road and appurtenances thereto and adjacent right of way to a condition reasonably equal to or better than that existing prior to such installation nor may a county road commission charge a government entity a permit fee exceeding \$300.00 per permit or \$1,000.00 total for all permits per project. [Emphasis added.]

In interpreting a statute, this Court must effectuate the intent of the Legislature.¹² The Legislature's intent is clear if the language of the statute is unambiguous, and the statute must be enforced as written.¹³ The language of MCL 224.19b(4) unambiguously requires a county road commission to issue a permit to a government entity for the installation of any utility as long as that entity furnishes the appropriate security. Therefore, Wayne County could not refuse to grant Northville Schools a permit to install a utility line in its road right-of-way since Northville Schools furnished the requisite bond.

¹¹ Const 1963, art 7, § 29.

¹² *Weakland*, *supra* at 347.

¹³ *Id.*

However, nothing in the language of the statute nullifies Wayne County's constitutional right "to the reasonable control of [its] highways."¹⁴ Accordingly, we conclude that Wayne County retained the discretion to place restrictions on permits issued to governmental authorities, such as Northville Schools, as long as the restrictions were not arbitrary and unreasonable.¹⁵

Here, the trial court found that Wayne County's restriction of requiring cable installation at least fifty-seven feet from the centerline of the roadway was "arbitrary and unreasonable" and "effectively den[ied] a permit." The trial court noted that "this project dies for all practical purposes if [Northville Schools] can't reach voluntary agreements . . . with any number of individual private property owners to grant them a right of way." Therefore, the trial court issued two writs of mandamus compelling Wayne County to grant Northville Schools permits permitting access within thirty-three feet of centerline of Wayne County's road rights-of-way where no wider road rights-of-way were available and, at fifty-seven feet from the centerline where wider road rights-of-way were available.

After reviewing the entire record, we conclude that the trial court did not clearly err in finding that the distance restriction Wayne County imposed on Northville Schools was arbitrary and unreasonable. Northville Schools presented photographs indicating that there were existing utility lines within thirty-three feet of the centerline of the Wayne County's roadways. Moreover, one of the witnesses, Duane Henderson, explained that to complete all three phases of the cable installation project, Northville Schools would be required to seek easements from third-party property holders in areas where Wayne County did not own more than thirty-three feet from the centerline of the roadway in order to satisfy Wayne County's distance restriction. Therefore, the distance restriction effectively denied Northville Schools a permit to which it was entitled in areas where Wayne County's right-of-way only extended thirty-three feet from the centerline of the roadway. In sum, we conclude that the trial court did not clearly err in finding that Wayne County's restriction on the distance of placement of the cable from the centerline of the roadway was arbitrary and unreasonable and did not abuse its discretion by granting the request of Northville Schools for a writ of mandamus compelling Wayne County to issue permits without such a restriction where necessary. Therefore, we uphold this order.

III. Attorney Fees

A. Standard Of Review

On cross-appeal, Northville Schools contends that the trial court erred in denying its request for attorney fees and costs because Wayne County's position lacked legal merit and included a frivolous defense. We review a trial court's decision concerning attorney fees and costs for an abuse of discretion.¹⁶ A trial court's decision constitutes an abuse of discretion when

¹⁴ Const 1963, art 7, § 29.

¹⁵ See *City of South Haven v South Haven Charter Twp*, 204 Mich App 49, 52; 514 NW2d 176 (1994).

¹⁶ *Kernen v Homestead Dev Co*, 252 Mich App 689, 691; 653 NW2d 634 (2002); *Schoensee*, *supra* at 314.

the result is “so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion.”¹⁷ We review a trial court’s finding that a claim or defense is frivolous for clear error.¹⁸ “A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made.”¹⁹

B. Standards For Awarding Attorney Fees

When a court finds that a civil action or defense to that action was frivolous, the court “shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.”²⁰ Pursuant to MCR 2.114(F), “a party pleading a frivolous claim or defense is subject to costs.” To determine whether a claim or defense is frivolous within the meaning of MCL 600.2591 and MCR 2.114(F), a court must review the particular facts of the case.²¹ MCL 600.2591(3) defines “frivolous” as follows:

- (a) “Frivolous” means that at least 1 of the following conditions is met:
 - (i) The party’s primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
 - (ii) The party had no reasonable basis to believe that the facts underlying that party’s legal position were in fact true.
 - (iii) The party’s legal position was devoid of arguable legal merit.

C. Applying The Standards

Here, the trial court’s finding that Wayne County’s distance restriction was arbitrary and unreasonable did not equate to a finding of a frivolous defense. Rather, the trial court concluded that Wayne County was not subject to sanctions pursuant to MCR 2.114(F) because “[t]he County had a position which [was] not untenable, it just didn’t prevail.” Moreover, the trial court recognized that, under the language of the first writ of mandamus, Wayne County was not responsible for issuing the remaining permits.

Wayne County based its position that it had the authority to issue permits restricting access to fifty-seven feet from the centerline of its roadways on the alleged fact that such distance restrictions were typical in permits that Wayne County issued, and also on constitutional

¹⁷ *Id.* at 314-315.

¹⁸ *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002).

¹⁹ *Id.* at 661-662.

²⁰ *Vermilya v Dunham*, 195 Mich App 79, 84; 489 NW2d 496 (1992), quoting MCL 600.2591.

²¹ *In re Stafford*, 200 Mich App 41, 42-43; 503 NW2d 678 (1993).

and statutory provisions that, in its view, provided the authority to restrict permits for utility lines. Although this position ultimately failed, we conclude that Wayne County presented arguments sufficiently grounded in law and fact to avoid sanctions for a frivolous defense. Therefore, we hold that the trial court's determination that Wayne County's claims lacked frivolity was not clearly erroneous and that the trial court's refusal to award attorney fees and costs to Northville Schools was not an abuse of its discretion.

Affirmed.

/s/ Hilda R. Gage
/s/ William C. Whitbeck
/s/ Henry William Saad